

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REYNALDO RODRIGUEZ,

Defendant-Appellant.

UNPUBLISHED
February 14, 2003

No. 236641
Saginaw Circuit Court
LC No. 76-000565-FY

Before: Sawyer, P.J. and Jansen and Donofrio, JJ.

PER CURIAM.

Defendant appeals on leave granted the order denying his amended motion for relief from judgment. We affirm.

This case commenced more than one-quarter of century ago. Pursuant to a plea agreement entered on February 14, 1977, defendant pleaded guilty to second-degree murder in exchange for the prosecution's dismissal of the open murder charge against him. In providing a factual basis for his plea, defendant admitted that on July 31, 1976, he shot dead Robert Cuellar while the victim was riding a bicycle down a residential street in broad daylight. On April 21, 1977, Judge Gary R. McDonald (then a Saginaw Circuit Court judge, now retired from the Michigan Court of Appeals) sentenced defendant to life imprisonment. In sentencing defendant, Judge McDonald stated in pertinent part:

I do have discretion in the matter, but under the circumstances and the way that this killing took place, that I'm going to sentence you to life imprisonment. I want you to know that this is not the mandatory life imprisonment sentence. It shows that if you're a model prisoner, that you can be eligible for parole in ten years. Do you understand that? * * * I want the record to show that based upon my knowledge of you now, and I want the record to further show that if you're a model prisoner, that I would recommend your release on parole in ten years. Do you understand? * * * . . . Mr. Rodriguez, I don't think I can say anything more. I sure wish you well. I want you to do some thinking. And I feel myself, at this time, that you will not be any menace to society when you're released in ten years. And I wish you luck on your sentence. . .

Thereafter, defendant filed a motion to set aside his guilty plea in the trial court. After a hearing on August 24, 1977, Judge McDonald denied the motion in an order entered on August

24, 1977. Defendant then filed an application for leave to appeal with this Court, claiming that Judge McDonald erred in denying his motion to set aside his guilty plea. In an order dated February 21, 1978, this Court denied defendant's application for leave to appeal.

Thereafter, on June 26, 1981, defendant filed in the trial court a delayed motion to vacate his plea and a motion for resentencing. Following a hearing, Judge McDonald denied defendant's motions in an order dated September 2, 1981. Defendant subsequently filed a delayed application for leave to appeal in this Court, which denied it in an order entered on December 15, 1982. Defendant's application for rehearing was subsequently denied by this Court on January 27, 1983. Defendant then filed an application for leave to appeal in the Supreme Court, which denied the application on August 16, 1983. *People v Rodriguez*, 417 Mich 1092 (1983).

Subsequently, defendant filed a motion for sentence modification in the trial court, asking Judge McDonald to modify the sentence to conform with the judge's original intent to recommend his release in ten years if defendant were a model prisoner. At a hearing on September 2, 1986, Judge McDonald, giving an extensive statement on the record, denied the motion:

[T]he Court was looking in the sentencing transcript to get the exact words that the Court used back on April 21st, 1977. I, of course, remember this case quite well, because I corresponded with Mr. Rodriguez over a lot of years, and also with members of the family. I have followed his incarceration quite closely, and in fact was involved the last time in recommending that he be given medium security from maximum security. So I do recall the case very well.

It is my understanding from reading the parole board's classification of 14 years that the reason he was higher is because a review of the facts shows this to be an intentional killing. I think that was – they looked at how the killing took place, and felt that Mr. Rodriguez intentionally killed the deceased in this case.

That was true, and of course that is one of the things that this Court considered when I gave the sentence to begin with, that it appeared to the Court that this was really a cold-blooded killing in the sense that the Defendant at that time was not carrying a weapon – or the deceased was not carrying a weapon and that the Defendant apparently, as part of a vendetta to clear his sister's name, I believe, at the time killed or executed the deceased in this case.

The Court considered that, and that is why I did not give a term of years, but gave a life sentence, because I felt at the time that if Mr. Rodriguez in fact was a cold-blooded killer, contrary to all of the presentence investigation, that he should remain in prison the rest of his natural life.

Also, the Court was aware at the time that a person given life imprisonment under this statute cannot be released under any circumstances unless the sentencing judge allows it, regardless of when he comes up for parole.

But clearly, it was my intent that if Mr. Rodriguez remained a model prisoner, that this Court would recommend his release in ten years. And I believe I have done that in several letters to the parole board.

Reviewing the transcript again, I think I stated, “I want the record to show that based upon my knowledge of you now, and I want the record to further show that if you are a model prisoner, that I would recommend your release on parole in ten years.”

That is what the Court said at the time I sentenced him. That is clearly what I intended to do, and in fact now that is what I did do. I did recommend that he be released in ten years.

However, I do know that I do not control the parole board, and I also know that I cannot modify a valid sentence, because this Court, a few years back was appealed on that very point, and reversed by the Court of Appeals, and the sentence was reinstated.

I have no power to modify a valid sentence. I did review the case, and I now feel it still was a valid sentence, which therefore precludes me from modifying the sentence to let Mr. Rodriguez out.

However, I would say if it will benefit Mr. Rodriguez that I was fully aware of the intentional killing at the time I sentenced him. In other words, the way the killing took place, I took that into account. And the reason that I explained it, and in this Court’s mind I think at the time of sentencing was that it was unfortunately part of a vendetta that had been carried on, and that there [were] reasons to explain why this appeared to be an intentional killing.

It was to clear the name of a sister, and it was not the usual – or this was not a case of a man going up to a stranger and merely shooting him – I can’t remember the number of times – but as I recall I think the gun was emptied into the deceased.

So, in summary, I still take the position that I recommend that he be released in ten years. But I cannot modify my sentence because it was a valid sentence when I gave it. And it was preconditioned on the fact that I would only recommend his parole if he was a model prisoner. And if he was not a model prisoner, I wasn’t going to let him out in ten years.

So that is why I sentenced him to life in prison.

He appears to have been a model prisoner, with a few minor infractions, as I recall reading. I do recommend again to the parole board that he be considered for immediate release, and that I feel the killing was – arose out of a vendetta and was not just a cool act of one person killing a stranger for no apparent reason.

So I will deny the motion to modify, but I will make those recommendations again on the record, if it will help you.

On September 5, 1986, Judge McDonald entered an order denying the motion to modify. Defendant then filed a motion to vacate the sentence in the trial court, claiming that his life sentence for second-degree murder violated the indeterminate sentencing statute. Judge McDonald again denied the motion pursuant to an opinion dated February 13, 1987 and an order entered on February 19, 1987.

On November 15, 1988, defendant filed a motion for habeas corpus and delayed motions to vacate the sentence and for resentencing in the trial court, claiming that he was entitled to resentencing because the Parole Board refused to release him after he had served ten years in prison. Again, in an order dated May 17, 1989, Judge Leopold P. Borrello, who succeeded Judge McDonald, denied defendant's motions, finding that his original sentence was valid. Thereafter, defendant filed an application for leave to appeal in this Court, challenging Judge Borrello's denial of his delayed motion for resentencing. In an order dated August 18, 1989, this Court denied defendant's application. Defendant then filed a delayed application for leave to appeal in the Supreme Court, which denied it on April 30, 1990. *People v Rodriguez*, 434 Mich 905 (1990).

On April 8, 1992, defendant filed a motion for relief from judgment in the trial court. Judge Borrello denied the motion in an opinion and order dated April 16, 1992. Defendant then filed a delayed application for leave to appeal with this Court, which denied the application in an order dated October 29, 1992. The Supreme Court subsequently denied defendant's application for leave to appeal in an order entered on March 29, 1993. *People v Rodriguez*, 442 Mich 879 (1993).

Thereafter, on May 18, 1993, defendant filed a petition for a writ of habeas corpus in federal district court, which denied it on June 3, 1994. Thereafter, defendant's application to the Sixth Circuit Court of Appeals for a certificate of probable cause was denied on November 17, 1994.

Subsequently, on August 29, 2000, defendant filed in the trial court a motion for relief from judgment, which is the subject of the present appeal. In that motion, defendant contended that he was entitled to resentencing on the basis of this Court's decision in *People v Wybrecht*, 222 Mich App 160; 564 NW2d 903 (1997), which held that "[p]arole eligibility is not a valid sentencing consideration." *Id.* at 173 (citing *People v Fleming*, 428 Mich 408; 410 NW2d 266 (1987) and *People v Abbett*, 199 Mich App 334; 501 NW2d 177 (1993), rev'd on other grounds 443 Mich 863 (1993)). According to defendant, resentencing was required because Judge McDonald improperly considered parole eligibility in determining his sentence.

In an opinion and order entered on September 27, 2000, Judge Borrello denied the motion:

The Court finds that Judge McDonald did not consider parole eligibility when he imposed defendant's sentence. The Court finds that Judge McDonald's statements regarding parole were made for two reasons. First, the Court finds that Judge McDonald discussed parole in order to explain to defendant that his

sentence was not for natural life. Second, the Court finds that Judge McDonald merely stated that he would recommend defendant to be released on parole in ten years if defendant was a model prisoner for those ten years. The Court finds that defendant's sentence was proper.

After Judge Borrello issued an order dated April 17, 2001 vacating his opinion and order of September 27, 2000, he ultimately denied defendant's motion for relief from judgment in an order dated August 24, 2001, finding that "Defendant is rehashing arguments that he presented to this Court, on August 29, 2000," and that "Defendant's sentence was proper." Thereafter, on November 15, 2001, this Court granted defendant's application for leave to appeal.

On appeal, defendant argues that Judge Borrello erred in denying defendant's motion for relief from judgment on the ground that he was entitled to resentencing because Judge McDonald improperly considered parole eligibility in sentencing him in violation of the rule stated in *Wybrecht, supra*, 22 Mich App at 160. A trial court's ruling on a motion for relief from judgment is reviewed for an abuse of discretion. *People v Ulman*, 244 Mich App 500, 508; 625 NW2d 429 (2001).

In this case, defendant cannot show that Judge Borrello abused his discretion in denying defendant's motion for relief from judgment. See MCR 6.508(D)(2). Even assuming that *Wybrecht* should be given retroactive effect, defendant's argument is fatally flawed because, as Judge Borrello properly found, "Judge McDonald did not consider parole eligibility when he imposed defendant's sentence." Rather, as Judge McDonald noted at the hearing on September 2, 1986 denying defendant's motion to modify his sentence, he sentenced defendant to life imprisonment for second-degree murder because defendant committed a "cold-blooded killing." Further, as Judge Borrello noted, the sentencing transcript makes clear that Judge McDonald did not discuss parole eligibility as a sentencing consideration, but rather "to explain to defendant that his sentence was not for natural life" and to provide him with the motivation to behave as a model prisoner. Because Judge McDonald did not consider parole eligibility as a sentencing factor, defendant thus cannot show that his life sentence for second-degree murder was invalid. See *In re Parole of Bivings*, 242 Mich App 363, 370-371; 619 NW2d 163 (2000) ("It is well settled that, absent an error that renders a sentence invalid, a circuit court lacks authority to modify the sentence a defendant has begun to serve.")

Affirmed.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Pat M. Donofrio